

EX PARTE OR LATE FILED

HOGAN & HARTSON

RECEIVED

OCT 7 1994

COLUMBIA SQUARE  
555 THIRTEENTH STREET NW  
WASHINGTON DC 20004-1109  
(202) 637-5600

October 7, 1994

ANTHONY S. HARRINGTON  
PARTNER  
DIRECT DIAL (202) 637-5646

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

BRUSSELS

LONDON

PARIS

PRAGUE

WARSAW

BALTIMORE, MD

BETHESDA, MD

McLEAN, VA

Chairman Reed Hundt  
Federal Communications Commission  
1919 M Street, N.W.  
Room 814  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Cable Television Going Forward Proceedings -- Fifth Further  
Notice of Proposed Rulemaking, MM Docket No. 92-266

Dear Chairman Hundt:

On September 20, 1994, several representatives of Ovation, Inc. met with staff members of the Cable Services Bureau to discuss options under consideration by the Commission for resolving the above-captioned proceeding. As you know, this matter has been left open for many months, and has been the subject of extensive filings with the Commission. I cannot emphasize strongly enough how important a well-reasoned and expeditious decision is to emerging programming networks, such as Ovation. Accordingly, I would like to further respond in writing to some of the issues raised by the Bureau.

First, the Bureau described a proposal that would permit operators to add new services on an essentially unregulated basis. This so-called "New Product Tier" would be largely free of regulation, so long as the cable operator maintains the basic architecture of its regulated service offerings. \*/ As this idea was presented in the meeting, it appears to be a viable way of providing cable operators some needed pricing flexibility in the addition of new programming services. It is imperative, however, that such a plan be implemented in a way to ensure regulatory certainty and realistic choice.

With respect to certainty, the Commission must make clear its intention not to subject these New Product Tiers to more rigorous rate regulation at

\*/ As we understand the proposal, this does not mean that existing services necessarily would be "frozen" in place. Importantly, an operator would retain flexibility to replace an existing cable network with a new service. But for purposes of the New Product Tier, the services would be new to the system.

No. of Copies rec'd 0  
List ABCDE

Chairman Hundt

October 7, 1994

Page 2

some later time. If cable operators are not sure about their regulatory status, they will be very reluctant to take the risk of adding new services. This would harm programmers who would be deprived of a meaningful opportunity to reach an audience, and would deny the public access to new and diverse programming, contrary to the statutory goals established by the Congress.

Second, the Commission must ensure that new programming services are not foreclosed from reasonable opportunity to enter existing, highly penetrated tiers in addition to the New Product Tiers. This can be accomplished only if the Commission allows meaningful incentives for the addition of channels to regulated tiers. Ovation and others have filed extensive pleadings on this question that demonstrate that a mark-up of 25 cents plus a licensing fee would be a realistic reflection of actual market experience and should provide reasonable opportunities. Although various figures have been discussed, Ovation is concerned that incentives would be ineffectual if the allowable mark-up dropped below 20 cents. If incentives are inadequate, new services would be severely disadvantaged by being allowed to launch only on New Product Tiers. In the past, the access to a combination of basic regulated and a la carte tiers has been crucial to the successful launch of new programming networks. Thus, the viability of New Product Tiers as a policy option is determined to a great extent by the adequacy of programming incentives on regulated tiers.

Another question involves the imposition of an annual cap on the price increase that would be permitted through use of programming incentives. Various figures have been mentioned, ranging from \$1.00 to \$1.50. There has been some suggestions that a lower figure might suffice because cable systems historically added only a few new services each year.

Ovation strongly believes that, assuming a cap is considered necessary at all, the larger number of \$1.50 more appropriately reflects the policy purposes of the Cable Act of 1992. As Ovation pointed out in its Comments in this Docket, a major focus of the Act was to foster new and diverse programming. This will not be achieved by unduly limiting the number of channels that could be offered in existing tiers.

Historical data on channel additions does not reflect actual market and policy needs. This proceeding was designated the "going forward proceeding," not the "looking backward proceeding." In this context, the Commission should recognize that channel additions have been put off since the onset of regulation,

HOGAN & HARTSON L.L.P.

Chairman Hundt

October 7, 1994

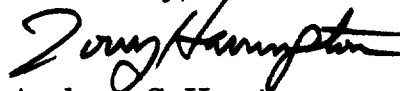
Page 3

thus resulting in pent-up demand for new services. At the same time, comments filed by Ovation and others demonstrated that more than 100 new networks are striving to find a place in the cable universe. That fact alone distinguishes the present and future from past practices. Any fears of runaway increases in cable offerings and costs are unrealistic in light of marketplace realities and limits on available capacity for at least the next couple of years.

Finally, Ovation cannot over-emphasize the need for the Commission to act as soon as possible, on the overall going forward package (including pending à la carte issues) even if it is not to be effective before next year. The delay in concluding this proceeding has already required Ovation and other highly desirable new networks to postpone launch plans. Uncertainty as to Commission actions has virtually suspended new carriages and necessary financing. The problems for new programming were recognized immediately after the Commission's action in February. Further delay will likely deprive the public of important new and diverse program offerings.

Thank you for the opportunity to address these issues. Please feel free to contact me if you have any questions.

Yours truly,



Anthony S. Harrington

cc: Commissioner Quello  
Commissioner Barrett  
Commissioner Ness  
Commissioner Chong